92-965

NO. _____

Supreme Court, U.S.
FILED
DEC 2 1992
OFFICE OF THE CLERK

IN THE
**Supreme Court of the United States**
**October Term, 1992**

BERNARD GELB,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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49 pp

## QUESTION PRESENTED

Whether an award of restitution in the amount of $5,000,000.00 should be allowed to stand when the District Court (A) specifically concluded that the defendant can never pay that amount and (B) made no specific findings regarding the factors set forth in 18 U.S.C. Sections 3663 and 3664 except for the finding that the defendant is unable to pay the restitution?

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IN THE

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---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bernard Gelb ("Gelb") petitions for a writ of certiorari to review an Order of the United States Court of Appeals for the Second Circuit.

## OPINION BELOW

The Order of the Second Circuit (Appendix A) was unreported. That Order affirmed the amended judgment of conviction dated December 5, 1991 (A-2) and the document entitled "Attachment to Amended Sentence" also dated December 5, 1991 (A-3).

## JURISDICTION

The Order of the Second Circuit was entered on September 3, 1992. This Court has jurisdiction pursuant to

28 U.S.C. Section 1254(1).

## STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. Section 3664 provides in pertinent part:

(a) The court, in determining to order restitution under Section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the event, the financial resources of the defendant, the financial needs and earning ability of the defendant and defendant's dependents, and such other factors as the court deems appropriate . . .
(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice required.

2. 18 U.S.C. Section 3663 provides in part:

(f)(1) The court may require that such defendant make restitution under the section within a specified period or in specified installments.
(2) The end of such period or the last such installment shall not be later than --
(A) The end of the period of probation, if

probation is ordered;

(B) Five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) Five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

3. 18 U.S. C. Section 3572(a) provides in relevant part as follows:

(a) *Factors to be considered in imposing fine*--The court, in determining whether to impose a fine and . . . in determining the amount of the fine, the time for payment, and the method of payment, shall consider--

(1) the factors set forth in section 3553(a) . . . including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources . . . ;

(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant . . . ;

(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation and the victim of the offense . . . ; [and]

(4) any other pertinent equitable consideration.

4. 18 U.S.C. Section 3572(b) provides in pertinent part:

> [i]f, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability to the defendant to make restitution.

## STATEMENT OF THE CASE

*A. The August 1991 Remand Order*

In its amended opinion dated August 6, 1991, a panel of this Court (Newman and Pratt, C.J.J., and Sweet, D.J.), vacated in full a $5 million restitution award and the tax sentence imposed on Mr. Gelb, *see United States v. Gelb*, 944 F.2d 52, 60 (2d Cir. 1991), and remanded both the restitution award and the tax sentence for further consideration by the District Court (*id.*).

As defined by this Court's amended opinion in *Gelb*, the restitution issue on remand was delineated in the following terms:

> Finally, Gelb is correct in asserting that, if restitution is ordered under [18 U.S.C.] Sec. 3663, "[a] district judge must consider all the factors listed in section 3580(a) [now section 3664] at the time of sentencing, and may in his discretion reach a compromise figure based on that consideration." *United States v. Atkinson*, 788 F.2d 900, 904 (2d Cir. 1986). However, there is no requirement that specific findings be made on each factor because "such fact finding would unnecessarily encumber a sentencing proceeding." *Id.*

> at 902. Thus, on remand, the district judge need only "consider" the listed factors, *Id.*, and a statement that the district judge has considered the statutory factors is sufficient. *Id.* at 902-03. [944 F. 2d at 56-57.]

With respect to the remand of the tax sentence, the Second Circuit, in its amended opinion, "vacate[d]" the tax sentence in full (944 F.2d at 60) "for sentencing on the three tax convictions in light of the analysis and legal principles discussed in this opinion." (*Id.*) Briefly described, the amended opinion's discussion of the "analysis and legal principles" which led to the remand on the tax convictions was summarized by the Second Circuit as follows:

> Here, Judge Van Sickle erroneously believed that Section 7206(1) allowed the sentence he imposed on count 75. It is clear that, for having filed the three false tax returns, the judge intended to sentence Gelb to the statutory maximum term of imprisonment and a $75,000 fine plus 5 years of probation. There was no counts for the prison term and fine in preference to the others . . . Given the continuing vitality of all three convictions and the district court's original intent, confirmed by its ineffective attempt to correct the error, the district court should now be afforded a final opportunity to settle the matter by resentencing Gelb on all three of the tax counts. [944 F.2d at 59-60.]

*B. The Evidence Developed on Remand*

In anticipation of the remand hearing on December 4, 1991 (the "December 1991 Hearing"), Mr. Gelb submitted a detailed set of papers relating to a range of financial and other issues. Among other things, Mr. Gelb in a declaration dated November 9, 1991 described his personal financial

condition:

> I am now 48 years old. Except for the loving relationship I have with my wife and two children, my life is and has been a failure. I was born to working class parents in Pennsylvania; they never accumulated any wealth and they are now dead. I graduated from high school and, although I have taken some college level courses, I have never obtained any type of degree. I have no profession or professional training.
>
> In 1988 and 1989, the last two years in which I was employed before beginning my imprisonment in late October 1989, I earned wages of $48,100.00 and $48,500.00. For the last two years, I have earned while in prison from $35.00 to $45.00 per month, all of which has been dedicated to the payment of my fine. As to the years before 1988, my wages ranged from $21,000 in 1980 to approximately $38,000.

In related comments, Mr. Gelb testified that "I make these points to underscore that I did not and do not now have the financial ability to pay the $5 million restitution and the $101,000 fine imposed by the Judgment of Conviction. Likewise, given my record of failure as a businessman, my lack of a college education and my lack of a profession, I have no remotely realistic prospect of ever becoming able to pay any portion of a fine and restitution of that magnitude." Mr. Gelb also attached his Pre-Sentence Investigation report which was prepared in 1988 in connection with his original sentencing and which disclosed that even at that time he had extremely limited financial resources.[1]

---

1. The Government did not challenge the accuracy of Mr. Gelb's description of his financial condition and the District Court, at the conclusion of the December 1991 Hearing, made it clear that Mr. Gelb has no realistic possibility of ever paying any portion of the monetary sanction.

Similarly, Mr. Gelb's wife of 27 years, Judith Gelb, testified as to her financial condition and the needs of herself and the couple's two children. Among other things, Mrs. Gelb described how, "[s]ince 1967, when our daughter was born, I have primarily dedicated myself to raising our two children . . ." She also testified to the "devastating" impact Mr. Gelb's indictment, trial and imprisonment has had on herself and the two children, both of whom continue to reside at home with her.

Mrs. Gelb was also highly specific regarding her and her children's financial condition:

> My family's financial situation was never strong but has certainly become more difficult since Bernard began serving his sentence [in October 1989]. He is not in a position to make any financial contribution to us at all, and he left no resources, funds, or assets of any kind that we can draw on to meet our needs.
>
> I now find myself working full-time for the companies which employed my husband, although I would certainly prefer returning to teaching, which is my first professional love. The business has become substantially smaller now than it was when Bernard was involved, and I have been able to hold the business together in the years in which my husband has been imprisoned only by working long hours and

by carefully overseeing all aspects of its operation. [2]

Moreover, Mrs. Gelb described in detail the financial results of her work: "In 1988 I earned wages of $18,980 and in 1989 I earned approximately $39,000. I have had no source of income other than wages from the business, and I have no assurance from month to month as to whether the business will survive. The staff is drastically reduced, and there is a constant possibility that the only remaining client of the business--Bronx Lebanon Hospital--will terminate its relationship [which it recently attempted to do]. That termination would immediately end the business."

Mrs. Gelb candidly summarized her family's financial condition:

> I am not pleading abject poverty, although I am pleading a profound sense of insecurity and uncertainty caused by Bernard's imprisonment and the terrifying financial burden of the restitution and fine which, although nominally imposed on him only, has an effect on me and my children. While my salary is a

2. The "business" to which Mrs. Gelb referred has been primarily the business of providing computer billing and related services, primarily through entities bearing the "EDP" name. The most significant of those entities was EDP Medical Computer Systems, Inc. ("EDP"), which was indicted along with Mr. Gelb in the Superseding Indictment returned in 1987. EDP was acquitted in full, on a jury verdict, at the conclusion of trial in October 1988 by the same jury which convicted Mr. Gelb.

> middle-income salary, it does not go far. I continue to pay almost $2,000 each month with respect to the mortgage on the home which I own, and I struggle to meet all the payments associated with our son's attendance at Queens College, where he is a sophomore. Although our daughter works, she has a junior level position, and she is not able to contribute to my support or her brother's support. Because of the family's difficult financial situation, we have been able to afford to visit Bernard only twice in almost two years he has been in prison in Pennsylvania.

The Government's response to the Gelbs' submission was a two-page letter addressed principally to the legal argument that, in connection with the remand proceedings, the District Court was "without jurisdiction to entertain" a concurrent motion for sentence reduction which Mr. Gelb had made under former Rule 35 of the Federal Rules of Criminal Procedure.[3] Significantly, not a word of the Government's submission contradicted or even questioned Mr. Gelb's and his wife's demonstration of their difficult

3. Although Judge Van Sickle ultimately concluded that Mr. Gelb could move for sentence reduction under former Rule 35, he denied any substantive relief to Mr. Gelb. We stress that Mr. Gelb is not appealing Judge Van Sickle's refusal under Rule 35 to reduce the length of imprisonment. Instead, the appeal to the Second Circuit focused on Judge Van Sickle's decision, in response to the remand mandate, not to alleviate the monetary penalty of $5 million in restitution and the $75,000 fine under the tax sentence.

financial situation and their grim financial prospects for the future. Indeed, the Government's papers, which stated that the United States "oppose[d] any reduction in the award of restitution", explicitly conceded that "it is unlikely the government will ever collect the entire sum . . ."

*C. The Remand Hearing*

The December 1991 Remand Hearing began with a delineation of the issues confronting the District Court. At the outset, Judge Van Sickle stressed that Mr. Gelb had for the first time provided the Court with detailed information as to the operation of the underlying offenses which he had committed and the amount of postage whose payment he had evaded. As Judge Van Sickle emphasized at various points during the hearing, Mr. Gelb "has finally now counter-attacked as to the amount of the loss sustained by the victim, the United States, as a result of the offense" and summarized that "there has been a very effective attack on [the Government's] $5 million figure."

In addition, Judge Van Sickle noted that Mr. Gelb "has resources" and "the financial needs and earning ability of the defendant and the defendant's dependents." Judge Van Sickle then concluded his opening description of the issues with the following comment:

> Now, I told you that I propose to correct the sentence . . . within the general framework. The precise detail of the language cannot be established until after I hear

> whatever further is available with reference to the matter of restitution . . . I feel that now I must hear, primarily, everything that will assist me to determine the problem of restitution, something which would justify me in reconsidering the restitution area of the sentence. And if counsel for the defense desires anything with reference as to Rule 35(b) which would cause me to issue [,] after I've issued the corrected sentence, something in alleviation of the burden imposed by that corrected sentence.
>
> First, Mr. Batista, do you wish to make a record, in view of what I've said, either addressing yourself to the areas I am concerned about, or taking issue, if you desire, with the decisions I have made, the basic decision being that I must hear more in order to develop the detail for the sentence with reference to the matters of the restitution, and I am willing to hear more from you as an offer for further matter to be considered under Rule 35(b) . . .

Given Judge Van Sickle's invitation, defense counsel then re-capitulated the essential points advanced in Mr. Gelb's evidentiary submissions. More specifically, defense counsel (i) elaborated on Mr. Gelb's sworn statements as to the amount of loss caused by Mr. Gelb's offenses and Mr. Gelb's testimony that the total loss was approximately $400,000, not $5 million; (ii) summarized Mr. Gelb's

current personal financial condition; (iii) identified Mrs. Gelb's and her children's current personal and financial condition; and (iv) emphasized Mr. Gelb's admission of guilt and remorse and his acceptance of responsibility as evidenced in his declaration submitted in connection with the remand proceeding.

At the conclusion of the defense presentation, Judge Van Sickle commented to the Government: "Well, there has been a very effective attack on your $5 million figure . . . The attack is in two parts . . . [T]here is now before the trial judge evidence that the $5 million figure is not accurate and now there is before the trial judge information concerning the financial resources of defendant, information concerning the financial needs and earning ability of the defendant's dependents and some other factors. What do you have to say?".

The Government's response to Judge Van Sickle was primarily to question "why wasn't this raised three years ago" when Mr. Gelb was originally sentenced in January 1989 and to summarize certain aspects of the trial testimony and evidence from September and October 1988 regarding the quantity of EDP's mailing". During the course of the Government's summary of the trial evidence, Judge Van Sickle interjected a crucial question:

> THE COURT: Mr. Mehler [AUSA Gordon Mehler], I appreciate what you are saying and, yes, this is all there, but I would like to study this from another

point. *Assume that this man is released from his confinement within the next several years, what is the use of a $5 million obligation that he can't pay? What is the use of a $75,000 fine that he can't pay? Do we have any obligation to tailor something that he can pay, or is it more appropriate to let the extent of his offense remain on the record by letting the dollar amount stand?*

What do you have to say about that?

MR. MEHLER: I believe that the second position is the correct one. [emphasis supplied.]

Ultimately, Judge Van Sickle concluded the December 1991 Hearing by reserving decision on the various issues.

*D. The Amended Judgment*

Within twenty-four hours of concluding the remand hearing, Judge Van Sickle issued, on December 5, 1991, the amended judgment and the related "attachment" from which the appeal to the Second Circuit was taken. Briefly described, the amended judgment re-imposed a 13-year term of imprisonment, a $24,000 fine with respect to Count 1 under the Racketeer Influenced and Corrupt Organizations Act, and a $1,000 fine with respect to Count 2 under the mail fraud statute. In addition, with respect to the corporate tax convictions under Counts 74, 75 and 76, the judgment suspended sentence as to Count 74, imposed

a concurrent three year term of imprisonment under Count 75, and imposed a $75,000 fine under Count 76. The judgment also placed Mr. Gelb on probation for five years following his release from custody or his parole.

As to the restitution issue, the judgment "confirmed" the prior restitution award in the full amount of $5 million. In the document entitled "Attachment to Amended Sentence", Judge Van Sickle wrote, in part:

> This Court has considered all four factors of concern under the statute. The evidence of the United States as to the amount of loss, although questioned by the defense at the hearing on December 4, 1991, remains unchanged. The defendant has, by affidavits of himself, his wife, and his lawyer, presented evidence as to the other three elements under the statute . . .
>
> *So this Court, while it realizes the defendant can never repay the total restitution,* as measured by the victim's loss, *is unable to establish a restitution figure that is realistic, and the Court therefore is compelled to let the restitution stand as originally computed.* [emphasis supplied.]

*E. The September 3, 1992 Order of the Second Circuit*

In this September 3, 1992 Order of the Second Circuit, the court affirmed the amended sentence of the District Court. The Second Circuit stated:

> After the remand, the District Judge expressly stated that he had considered 'all four factors of concern under the statute' and concluded that he would leave undisturbed the $5 million restitution obligation.
>
> Gelb now challenges that decision on the ground

that the District Judge, in restating the restitution obligation, volunteered the view that he 'realizes the defendant can never repay the total restitution' that view, Gelb contends, obliges us now to vacate the award. He relies on *United States v. Mahoney,* 859 F. 2d 47 (7th Cir. 1988), in which the Seventh Circuit concluded that a restitution award had been made without proper consideration of the defendant's ability to pay where the circumstances made it appear unlikely that the defendant could ever repay the full amount of the award.

This Circuit's approach to imposition of a restitution award does not follow the Seventh Circuit's. Instead, we have recognized that a defendant may be ordered to repay the full amount of the loss caused by his criminal conduct notwithstanding his present indigency. *See United States v. Atkinson,* 788 F.2d 900, 904 (2d Cir. 1986). We require only that the sentencing judge consider all of the statutory factors and make a balanced decision as to the appropriate amount to be imposed as restitution. *Id.* In the pending case, the District Judge originally selected the total loss figure of $5 million as the appropriate amount of restitution, and now, in specific response to our remand, has assured us that he has considered the statutory factors and nonetheless continues to believe that the $5 million award is appropriate. We see no basis for saying that his amended sentence is invalid.

It is at this juncture which we now stand.

## REASONS FOR GRANTING THE WRIT

### A. THE SECOND CIRCUIT'S DECISION UPHOLDING APPLICATION OF 18 U.S.C. SECTIONS 3663 AND 3664 WITHOUT SPECIFIC FINDINGS OF FACT IS IN CONFLICT WITH OTHER CIRCUIT DECISIONS ON THE SAME MATTER

In *United States v. Mahoney,* 859 F.2d 47, 50 (7th Cir. 1988), the Seventh Circuit addressed the application of 18 U.S.C. Sections 3663 and 3664 when it stated:

> Thus, we have held that '[a]lthough the sentencing judge need not explicitly state he is relying on the mandatory factor, the appellate court must reverse where the defendant shows either (1) that the judge explicitly repudiated the mandatory factor, or (2) that it was not improbable that the judge failed to consider the mandatory factor and was influenced thereby.' *Gomer,* 764 F.2d at 1223.

The *Mahoney* court went on to vacate and remand a restitution award of $288,655. The *Mahoney* court found that such an award was a "sham" when it stated:

> More significantly, the restitution order itself--which requires the defendant to make full restitution (totalling over $288,000) over the requisite five-year period of payment--leaves little doubt that the judge simply forgot or disregarded the defendant's ability to pay and the needs of his dependent wife as well. We fail to perceive how this defendant, a man without any tangible assets and a $30,000 annual salary--will somehow be able to repay a debt totalling more than

> nine times his annual salary in five years. . . . Thus a combination of the restitution order itself and the judge's statements during sentencing convinces us that it is 'not improbable' that the judge failed to consider the mandatory factor regarding the imposition of restitution when imposing sentence under Section 3580(d). We thus fail to comprehend the basis for the court's order.

*Mahoney,* 859 F.2d at 51.

The *Mahoney* court also stated:

> Thus, *an impossible order of restitution,* as made in this case, *is nothing but a sham,* for the defendant has no chance of complying with the same, thus defeating any hope of restitution and impeding the rehabilitation process. (emphasis added).

*Mahoney,* 859 F.2d at 52.

The restitution order of $5 million against the petitioner herein, with a record replete with evidence of the defendant's inability to pay, is also a sham, yet it was upheld by the Second Circuit because the District Court alleged it had considered all the factors. The Second Circuit does not require specific findings of fact, only a statement that all factors were considered.

The decision below is squarely in conflict with *United States v. Palma,* 760 F.2d 475 (3rd Cir. 1985), as well as other circuit court decisions. In *Palma,* the defendant challenged the restitution award of over $1.5 million. Palma argued, *inter alia,* that the district court abused its discretion in ordering him to make full restitution of the $1,581,200 that Palma embezzled. The *Palma* court stated:

> This case has again demonstrated the importance

> of the district court's making findings of fact to facilitate meaningful appellate review of its discretionary ruling in this context. *See United States v. Criden,* 648 F.2d 814, 819 (3rd Cir. 1981). For this reason, we will invoke our supervisory power to require district courts in the future to make specific findings as to the factual issues that are relevant to the application of the restitution provisions of the VWPA (citation omitted).

*Palma,* 760 F.2d at 480.

The Second Circuit's position, as enunciated in *United States v. Atkinson,* 788 F.2d 900 (2nd Cir. 1986) is:

> Atkinson first asserts the District Judge erred by failing to consider all the stated factors in 18 U.S.C. Sec. 3580(a). That section directs that:
>
> > The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, *shall consider* the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.
>
> 18 U.S.C. Sec. 3580(a) (emphasis added). Atkinson contends that the district judge ignored the statutory directive to consider the financial condition of the defendant and, instead, simply ordered restitution of the undisputed amounts claimed by the banks in their victim impact statement. Argument that the VWPA envisions a balancing of factors, Atkinson alleges that the district judge's findings were inadequate.
>
> The third circuit has recently used its supervisory

> power to require district courts 'to make specific findings as to the factual issues that are relevant to the application of the restitution provisions of the VWPA'. *United States v. Palma,* 760 F.2d 475, 480 (3rd Cir. 1985). Believing that such fact finding would unnecessarily encumber a sentencing proceeding, we respectfully decline to follow the course taken by our third circuit colleagues. The plain language of section 3580(a) requires only that the district judge 'consider' the listed factors; there is no requirement, as urged by defendant, that specific findings be made on each factor.

*Atkinson,* 788 F.2d at 901-902.

It is interesting to note that the *Atkinson* case dealt with a restitution award of just under $30,000. The instant matter addresses a restitution award of $5 million.

However, specific findings of fact, as the defendant urged in *Atkinson,* would alleviate the burden on a defendant of an improper award of restitution which could not possibly be repaid. Specific findings of fact were also upheld in *United States v. Thomas,* 760 F.2d 475 (3rd Cir. 1985).

Some courts hold for the proposition set forth in *U.S. v. Palma, supra,* and other courts follow *Atkinson, supra.*

In *United States v. Clark,* 901 F.2d 855, 857 (10th Cir. 1990) the court stated:

> A district court may make a finding on the basis of information in the presentence report as to whether a defendant has proven by a preponderance of the evidence as required by section 3664(d) an inability to pay restitution. See *Guidelines Commentary,* Section 5E1.1 (sentencing judge made based finding on the

> presentence report). Yet in this instance, the district court apparently ignored the evidence of Clark's inability to pay and imposed upon her $153,762 in restitution. Nothing before the District Court suggested that Clark could pay this amount of restitution immediately. There must be evidentiary basis for proper exercise of discretion.

In the instant matter, because the Second Circuit finds that specific findings of fact with regard to the four factors delineated by this statute are not required, and just a statement that all the factors were considered is sufficient, it is impossible to determine whether or not the court actually considered this petitioner's inability to pay the $5 million restitution award. It is this conflict among the circuits which can result in unmonitorable abuse of discretion that must be addressed by this Court.

In *United States v. Mitchell*, 893 F. 2d 935, 936 (8th Cir. 1990) the court stated:

> While the trial court heard objection from Mitchell's counsel to the initial restitution order of over $45,000 and reduced the amount to $22,000, it failed to make any finding or receive any further evidence demonstrating Mitchell's ability to pay $22,000 over the 3-year period of time. We find the failure to make an informed decision whether Mitchell was able to pay $22,000 in restitution to be an abuse of discretion under the Sentencing Guidelines. The court has a great deal of discretion in ordering restitution. A court's order of restitution must, however, be consistent with the defendant's ability to pay as set forth in the Commentary to U.S.S.G. Sec. 5E4.1.

In *United States v. Peden*, 872 F. 2d 1303, 1310-1311 (7th Cir. 1989), the Seventh Circuit stated:

> We need not address the defendant's contention that the district court erroneously calculated the amount of restitution, because we agree with the defendant's argument that the district court failed to consider his ability to pay in ordering restitution in the amount of $84,225.06.
>
> 'Despite the fundamental need for appellate deference to trial court sentencing decisions, sentencing statutes such as the VWPA [Victim and Witness Protection Act] impose important substantive and procedural limitations on the trial judge's discretion.' *United States v. Mahoney,* 859 F. 2d 47, 49 (7th Cir. 1988). The Victim and Witness Protection Act "implicitly requires the district judge to balance the victim's interest in compensation against the financial resources and circumstances of the defendant-all while remaining faithful to the usual rehabilitative, deterrent, retributive, and restrictive goals of criminal sentencing.' *Id. (quoting United States v. Bruchey,* 810 F. 2d 456, 458 (4th Cir. 1987)). The imposition of restitution under the Victim and Witness Protection Act requires that the court consider 'the financial resources of the defendant, [and] the financial needs and earning ability of the defendant....' 18 U.S.C. Sec. 3580 (a). Such consideration is mandatory when imposing restitution under the Act. *United States v. Gomer,* 764 F. 2d 1221, 1222 (7th Cir. 1985).

While the Second Circuit may clearly defer to a District Court's finding with regard to an amount of restitution and any hearings held thereon, it is clear that without specific findings of fact, which the Second Circuit specifically does not require, abuse of discretion as well as inconsistencies

are found in awards of restitution under the VWPA. It is this discrepancy among the circuits which requires this Court's intervention.

The Eighth Circuit in *United States v. Owens,* 901 F. 2d 1457 (8th Cir. 1990) stated:

> We would encourage sentencing courts, when awarding restitution under the VWPA, to make specific findings of fact about the defendant's financial resources, financial needs and earning ability and the defendant's financial obligations to his or her dependents, if any. Effective appellate review is difficult, if not impossible, without specific findings of fact on the factors relevant to the application of the VWPA.

*Owens,* 901 F. 2d at 1459.

In this matter, the Second Circuit found:

> In the pending case, the District Judge originally selected the total loss figure of $5 million as the appropriate amount of restitution, and now, in specific response to our remand, has assured us that he has considered the statutory factors and nonetheless continues to believe that the $5 million award is appropriate. We see no basis for saying that his amended sentence is invalid.

The difference in opinion among the Circuits is further illustrated in *United States v. St. Gelais,* 952 F. 2d 90 (5th Cir. 1992), where the court found that the Fifth Circuit did not require a specific finding regarding the restitution factors in every instance and in *United States v. Barndt,* 913 F. 2d 193 (5th Cir.. 1990), where the Fifth Circuit held that the VWPA only requires a court to consider the

defendant's ability to pay and does not require explicit findings.

In *United States v. Morrison,* 938 F. 2d 168 (10th Cir. 1991) the court, again showing the diversion among the circuits, stated:

> The VWPA requires only that a sentencing judge consider the defendant's financial conditions; the judge need not specifically recite his findings regarding restitution.

In the instant case, it is clear from the testimony elicited at the District Court level - disregarded by the Second Circuit - that the defendant Gelb does not have the ability to pay the restitution order of $5 million. Specific factual findings would go far in determining if the court actually did consider all the statutory factors.

In *United States v. Bruchey,* 810 F. 2d 456 (4th Cir. 1986) the court stated:

> Without some finding of fact, we cannot be sure that the district court even considered the possibility of future hardship for the defendant and her children.

Without the specific findings of fact, which this Circuit has held to be unnecessary, it is impossible to determine if the District Court considered the necessary factors under the statute. The mere blanket statement by Judge Van Sickle that he did consider all of the factors flies in the face of the amount awarded in restitution, taking into account all the evidence before the court.

In *United States v. Patterson*, 837 F. 2d 182, 183 (5th Cir. 1988) the court discussed the differences in opinion among the circuits when it stated:

> Five circuits have addressed the question whether reasons must be assigned in those instances in which full restitution is ordered. Three require factual findings; two do not. See *United States v. Bruchey,* 810 F 2d 546 (4th Cir. 1987); *United States v. Hill* 798 F. 2d 402 (10th Cir. 1986); *United States v. Palma,* 760 F. 2d 475 (3rd Cir. 1985) (requiring factual findings); and *United States v. Purther,* 823 F. 2d 965 (6th Cir. 1987); *United States v. Atkinson,* 788 F. 2d 900 (2d Cir. 1986) (not requiring factual findings).

In *United States v. Purther,* 823 F. 2d 965, 969 (5th Cir. 1987) the court stated:

> This court had held that the record must contain some indication that the sentencing court considered the defendant's financial conditions in ordering restitution. (*United States v, Durham,* 577 F. 2d 511 (6th Cir. 1985).

This conflict among the circuits has resulted in discrepancies in the application of the VWPA. Review of the application of 18 U.S.C. Sections 3663 and 3664 by the Circuits is necessary in order to avoid the discrepancies which arise.

While the *Mahoney, supra,* court vacated the restitution award of $288,000, this Circuit has upheld Gelb's restitution award of $5 million because of the Circuits' differences in opinion in requiring specific findings (*i.e., Palma, supra),* not requiring specific findings (*i.e. Atkinson, supra)* or reaching some middle ground *(Mahoney, supra).* Such varying applications of the VWPA have effectively denied the petitioner his rights and warrant a review by this Court.

While not directly addressed in the Circuit Court's reasoning, substantially similar reasons justify vacating the $75,000 *fine* imposed. 18 U.S.C. Section 3572 (a) sets forth the relevant statutory provisions and what a court must consider when imposing a fine. Clearly, neither the District Court nor the Second Circuit considered all the elements, because it it had, it would certainly not have awarded a $75,000 fine on top of $5 million in restitution. Support for this proposition is found in *United States v. Rivera*, 971 F. 2d 876, 895 (2d Cir. 1992) where the court stated:

> If the defendant is indigent a fine should not be imposed absent evidence in the record that he will have the earning capacity to pay the fine after release from prison.

The *Rivera* decision is in direct conflict with the decision below where the Second Circuit stated in part:

> Instead. we have recognized that a defendant may be ordered to repay the full amount of the loss caused by his criminal conduct notwithstanding his present indigency. *See United States v. Atkinson,* 788 F. 2d 900. 904 (2d Cir. 1986)

This further illustrates the conflict which exists within the *Second Circuit* itself, and which warrants review by this Court.

The record below is replete with evidence of the defendant's *inability* to pay either restitution or a fine. Once again, if this Circuit required specific findings, it would find, based on the factors set forth in 18 U.S.C. Section 3572, that imposition of a fine in this amount was improper. For the same reasons, a review by this court is necessary with regard to the imposition of a fine.

**B. THIS CASE PRESENTS IMPORTANT QUESTIONS ABOUT THE EXTENT TO WHICH THE COURT, CONSISTENT WITH STATUTORY AND CONSTITUTIONAL PROVISION, CAN ORDER SUCH AN IMPROPER AMOUNT OF RESTITUTION.**

The record below is replete with evidence substantiating the petitioner's claim that he could not possibly repay the $5 million restitution award. While the Second Circuit relies on *Atkinson, supra,* it is distinguishable here because it addresses a restitution award of $29,813.76. Such amount might realistically be achievable. *But,* the $5 million amount of restitution is a sham, *See United States v. Mahoney supra,* and conflicts with the Court's authority afforded it under 18 U.S.C. Sections 3663 and 3664.

In *United States v. Smith,* 944 F. 2d 618, 623 (9th Cir. 1991) the Ninth Circuit stated:

> Thus, if a District Court fails to consider a defendant's ability to pay, the court abuses the discretion afforded by the Act (citation omitted).

By not requiring specific findings of fact, as the Second Circuit holds, it is impossible to determine if the District Court actually did consider all the factors or if it, knowingly or unwittingly, abused its discretion.

In United *States v. Gomer,* 764 F. 2d 1221 (7th Cir. 1985) the court stated:

> In sum, the District Judge committed plain error in awarding restitution without considering the financial

needs and earning ability of *Gomer's* dependents.

In *United States v. Studley,* 892 F. 2d 518 (7th Cir. 1989) the defendant raised a question as to whether the trial court considered his financial resources, needs and earning ability as Section 3664 (a) requires. The court found that it was at a loss to understand how the defendant could possibly raise the amount of restitution awarded during his 18 month confinement.

In *United States v. West,* 942 F.2d 528, 533 (8th Cir. 1991), the court stated:

> Given the discrepancy between West's ability to pay and the amount of the restitution order, we conclude that the district court did not properly take into account West's financial condition in setting the restitution amount.

In *United States v. Pollack,* 844 F. 2d 145 (3rd Cir. 1988) the court, in citing *United States v. Sleight,* 808 F. 2d 1012, 1021 (3rd Cir. 1987) stated:

> The government acknowledges that '[r]estitution may not be ordered in an amount that a defendant cannot realistically pay within the five year restitution period.'

In *United States v. Joseph,* 914 F. 2d 780, 785 (6th Cir. 1990), the court stated:

> Although indigency is not a bar to an order of restitution, (citations omitted), the financial resources and earning ability of the defendant must at least be considered in determining whether to order restitution under the Victim Act.

In *United States v. Rogat,* 924 F. 2d 983, 985 (10th Cir. 1991) the court went through the circuit decisions when it addressed a $2.5 million restitution order. The *Rogat* court stated:

> A restitution order will be upheld if the evidence indicates a defendant has some assets or earning potential and thus possibly may be able to pay the amount ordered. The Fifth Circuit, for example, affirmed a $250 per week restitution order against an electrician with a present earning ability of $500 per week because he had a 'viable trade and good employment prospects.' *United States v. Paden,* 908 F. 2d 1229, 1237 (5th Cir. 1990). In *United States v. McClellan,* 868 F. 2d 210. 213 (7th Cir. 1989), the Seventh Circuit upheld a restitution order of over $650,000 against a physician who, despite his current bankruptcy and low income had 'tremendous earning potential'.
>
> The possibility of repayment, however, can not be based solely on chance. For example, in vacating a restitution order in *United States v. Mitchell,* 893 F. 2d 935, 936 n.1 (8th Cir. 1990). the Eighth Circuit rejected the prosecutor's argument that the defendant might win the lottery. Similarly, the Seventh Circuit vacated an order requiring an indigent farmer to repay $32,600 by the date he was scheduled to be released from prison because he could not raise that amount while in prison. *United States v. Studley,* 892 F. 2d 518. 532-33 (7th Cir. 1989). *But cf. United States v. Ryan,* 874 F. 2d 1052, 1054 (5th Cir.) (restitution order of over two million dollars payable within five years of release from prison upheld because 'defendant's financial situation may well change in the future, making him able to pay some if not all the restitution'), *cert. denied,* 489 U.S. 1019. 109 S. Ct.

1138, 103 L. Ed. 2d 199 (1989).

The Circuit Court relied on the District Court's (J. Van Sickle) blanket statement that it had..." considered the statutory factors..." Yet this statement is in direct contradiction with the evidence developed on remand as well as the evidence presented to the Circuit Court on Appeal. This has risen to the level that it is "not improbable" *(see Mahoney, supra)* that the court below ignored the statutory factors because it is not held to the requirement of other circuits that specific findings of fact be made. Only this Court can address these discrepancies.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Great Neck, New York
December 1, 1992

Respectfully submitted,

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# United States District Court

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
V.
BERNARD GELB

JUDGMENT IN A CRIMINAL CASE
Case Number: CR-87-00219-01 (TCP)

Paul Batista
*Attorney for Defendant*

THE DEFENDANT ENTERED A PLEA OF:
Not Guilty as to all counts

THERE WAS A:
Verdict of guilty as to counts 1-15, 17-21, 23-25, 27, 30, 32, 34, 36-49, 51, 52, 54-58, 61, 63, 65, 68, 74, 75 & 76

THERE WAS A:
Finding of not guilty as to counts 69, 70, 71, 72, 73, 77 & 79
Judgment of acquittal as to counts 69, 70, 71, 72, 73, 77 & 78

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Having violated Title 18, U.S. Code, SS 201 (b) (1) (C ); 1341; 1962(c); and 1963 and Title 26, U.S. Code, SS 7201;7206 (1) amd 7206 (2).

IT IS THE JUDGMENT OF THIS COURT THAT:

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 13 years as to count 1 plus a fine of $25,000.00; 5 years as to count 2 plus a fine of $1,000.00; 13 years as to each count as to counts 3-8.

On counts 1 through 8, time is to be served concurrently.

On counts 9 through 15, 17 through 21, 23 through 25, 27, 30,32, 34, 36 through 49, 51, 52, 54 through 58, 61, 63, 65, and 68, imposition of sentence is hereby suspended and the defendant is placed on probation for a period of 5 years.

As to count 74, imposition of sentence is hereby suspended and defendant is placed on probation for a period of 5 years.

As to count 75, defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3 years to be served concurrently with all other counts.

As to count 76, defendant is placed on 5 years probation and fined $75,000.00. Probation shall commence at such time as the defendant is released from the custody and control of any confinement or parole. See attached Condititons of Probation.

After consideration of the four elements recited in Title 18 U.S.C. Section 3664, restitution is confirmed in the amount of $5,000,000.00. See Attachment to Amended Sentence Re: Bernard Gelb Case No. CR-87-00219-01 (TCP) (dated December 5, 1991).

## CONDITIONS OF PROBATION

Probation has been ordered the defendant shall:

Refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by law enforcement officer:
Associate only with law-abiding persons and maintain reasonable hours:
Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work, notify your probation officer at once, and consult him prior to job changes):
Do Not leave the judicial district without permission of the probation officer:
Notify your probation officer immediately of any changes in your place of residence:
Follow the probation officer's instructions and report as directed.
The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period
During the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

FURTHER ORDERED that the defendant shall pay a total special assessment of $_____pursuant to Title 18 U.S.C. Section 3013 for count(s)_____ as follows:

FURTHER ORDERED THAT counts _____ are DISMISSED by motion of the United States.

FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount specified as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid by the defendant shall immediately notify the United States attorney for this district of any change in name or address.

FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

The Court orders commitment to the custody of the Attorney General and recommends:

This amended judgment is signed this 5th day of December 1991.
Imposition of Sentence

_____
Signature of Judicial Officer

United States District Judge
and Title of Judicial Officer

_____
Date

**RETURN**

I executed this Judgment as follows:

_____

_____

_____

Warrant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By_____
Deputy Marshal

## APPENDIX B

Attachment to Amended Sentence Re: Bernard Gelb
Case No. CR-87-00219-01 (TCP)

Pursuant to Title 18 U.S.C. Section 3664, with reference to the problem of restitution:

This Court has considered all four factors of concern under the statute. The evidence of the United States as to the amount of loss, although questioned by the defense at the hearing on December 4, 1991, remains unchanged. The defendant has, by affidavits of himself, his wife, and his lawyer, presented evidence as to the other three elements under the statute. The defendant admits that practically all of his unlawful gains were plowed back into the business, and into real estate used, at least in part, in the business. The family residence, purchased in 1978 for $60,000.00 is now estimated to be worth $200,000.00 and carries a present mortgage of $150,000.00. Also the proceeds of the mortgage are represented to have been plowed into the business. Thus, the remaining equity in the house is not likely to exceed the defendant's lawful investment therein. But the business, the real estate, and any other holdings, some of which are held under other corporations, are, by defendant's own admission, primarily the result of defendant's criminal activities. And those items have never been clearly identified and valued by the defendant.

So this Court, while it realizes the defendant can never repay the total restitution, as measured by the victim's loss, is unable to establish a restitution figure that is realistic, and the Court therefore is compelled to let the restitution stand as originally computed.

Dated this 5th day of December, 1991

Bruce M. Van Sickle, Judge
United States District Court

## APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of September, one thousand nine hundred and ninety-two.

PRESENT: HONORABLE WILFRED FEINBERG,
HONORABLE JON O. NEWMAN,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

---

UNITED STATES OF AMERICA,
Appellee,

v.

BERNARD GELB,
Defendant-Appellant.

---

## ORDER

Appeal from the United States District Court for the Eastern District of New York (Bruce M. Van Sickle, Senior Judge of the District Court for the District of North Dakota, sitting by designation).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern

District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the amended sentence of the District Court be and it hereby is AFFIRMED.

Bernard Gelb appeals from the amended sentence dated December 5, 1991, imposed by the District Court after a remand ordered by this Court. *See United States v. Gelb*, 994 F.2d 52 (2d Cir. 1991). In that decision we rejected most of Gelb's challenges to the inclusion in the sentence of a $5 million restitution award, notably the challenge to the sufficiency of the evidence to support the finding as to the amount of the loss, but remanded because the District Judge had not made it clear that he has considered all of the factors required to be considered by 18 U.S.C. § 3644.

After the remand, the District Judge expressly stated that he had considered "all four factors of concern under the statute" and concluded that he would leave undisturbed the $5 million restitution obligation.

Gelb now challenges that decision on the ground that the District Judge, in restating the restitution obligation, volunteered the view that he "realizes the defendant can never repay the total restitution." That view, Gelb contends, obliges us not to vacate the award. He relies on *United States v. Mahoney*, 859 F.2d 47 (7th Cir. 1988), in which the Seventh Circuit concluded that a restitution award had been made without proper consideration of a defendant's ability to pay where the circumstances made it appear unlikely that the defendant could ever repay the full

amount of the award.

This Circuit's approach to imposition of a restitution award does not follow the Seventh Circuit's. Instead, we have recognized that a defendant may be ordered to repay the full amount of the loss caused by his criminal conduct notwithstanding his present indigency. *See United States v. Atkinson*, 788 F.2d 900, 904 (2d Cir. 1986). We require only that the sentencing judge consider all of the statutory factors and make a balanced decision as to the appropriate amount to be imposed as restitution. *Id.* In the pending case, the District Judge originally selected the total loss figure of $5 million as the appropriate amount of restitution, and now, in specific response to our remand, has assured us that he has considered the statutory factors and nonetheless continues to believe that the $5 million award is appropriate. We see no basis for saying that his amended sentence is invalid.

We note that the District Judge understandably attributed part of his difficulty in selecting some arguably more appropriate figure to the uncertainties the defendant himself had created concerning the true state of his current finances.

_____

_____

_____

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.